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Nos. 16-1436 and 16-1540

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,
v.
STATE OF HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Ninth Circuits

BRIEF OF *AMICI CURIAE* IMMIGRATION, FAMILY, AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF RESPONDENTS

MARK A. ARONCHICK
Counsel of Record
ROBERT A. WIYGUL
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
maronchick@hangley.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. (202) 789-0096 WASHINGTON, D.C. 20002

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INTEREST OF AMICI CURIAE

Amici curiae are leading scholars of immigration, family, and constitutional law who are interested in the proper interpretation and application of U.S. laws as they concern Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). This brief addresses issues specifically within amici's scholarly expertise. The Appendix to this brief contains biographical information on the amici, who are participating in their individual capacities and not as representatives of the institutions with which they are affiliated.

All parties have consented to the filing of this amicus brief.[1]

SUMMARY OF THE ARGUMENT

Amici, experts in immigration, family, and constitutional law, write to emphasize how the Executive Order infringes the constitutional family rights of American citizens and lawful permanent residents to a degree not permitted even in a case involving immigration, and undermines the congressional purpose of facilitating family reunification. Many of the individuals directly affected by the Executive Order are American citizens and residents who possess constitutionally protected interests in residing

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[1] No counsel for any party authored any portion of this brief, nor did any person or entity other than amici curiae or their counsel make any monetary contribution to the preparation or submission of this brief. One of the amici, Professor Hiroshi Motomura, is Vice Chair of the Board of Directors of the National Immigration Law Center, which is co-counsel for the respondents in Docket No. 16-1436. However, Professor Motomura participated in preparing this brief not in his capacity as a board member or representative of the National Immigration Law Center but rather as an independent legal scholar.

with and enjoying the companionship of family members who live outside the United States.

Noncitizens without family in the United States have suffered from the effects of the Order, and they, too, have constitutional claims. This brief, however, focuses on the Order's impact on American citizens and lawful permanent residents whose relatives' entry into the United States is restricted based on their race, religion, and nationality.

Notwithstanding the deference afforded to the executive and legislative branches in immigration matters, this Court has made clear that Americans' constitutional rights do not disappear in the immigration context. Rather, the Court safeguards those rights while also recognizing the government's important interest in foreign affairs and national security. Even assuming that foreign nationals residing abroad have no constitutional right to enter the United States, American citizens and lawful permanent residents do have justiciable constitutional interests in the context of an immigration restriction, as the Court recognized in cases that include *Kleindienst v. Mandel*, 408 U.S. 753 (1972), *Landon v. Plasencia*, 459 U.S. 21 (1982), and *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Where, as here, the interests of American citizens and lawful permanent residents are at stake, *Mandel* instructs courts to defer to the government's admissions decisions, but only when those decisions are supported by a "facially legitimate and bona fide" reason. 408 U.S. at 770. The Court has applied this important check on the government's immigration decisions in cases involving constitutional family interests; recognizing a "limited judicial responsibility under the Constitution" in *Fiallo v. Bell*, 430 U.S. 787,

793 n.5 (1977); and acknowledging the "facially legitimate and bona fide" requirement in *Fiallo*, *id.* at 794–95, and most recently in *Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015). This degree of judicial scrutiny carries with it a serious possibility of invalidating the government decision for failure to meet this standard.

The Court's approach to immigration laws and policies implicating individual constitutional rights has developed over time to reflect changes in the Court's understanding of equal protection and fundamental rights, including constitutional family rights. Nineteenth-century decisions affirmed the exclusion of Chinese nationals by endorsing racially discriminatory rationales that reflected the long-ago discredited view of equal protection expressed in contemporaneous cases such as *Plessy v. Ferguson*, 163 U.S. 537 (1896). Similarly, the Court's First Amendment jurisprudence has evolved to invalidate laws motivated by "animosity" toward or "distrust" of particular religious identities and practices. Cold War-era Court decisions declining to review the political branches' immigration decisions preceded the Court's recognition of constitutional family interests such as the right to marry unfettered by discrimination, and the right to share a household and associate with extended family members. Even when applying more deferential standards of review, the Court has forbidden statutes and regulations motivated by hostility toward disfavored groups—especially where, as here, such laws also infringe upon the constitutional family rights of American parties.

Congressional enactments such as the Immigration and Nationality Act ("INA") prioritize family relationships, facilitating the reunification of nuclear and extended families by preferring relatives in the issuances of permanent resident and temporary visas,

naturalization, derivative citizenship, and removal criteria. While the congressional purpose to support family reunification does not negate the executive's delegated authority under INA § 212(f), 8 U.S.C. § 1182(f), to suspend immigration, it qualifies that authority and supports greater scrutiny of executive decisions that contravene the INA's statutory structure for evidence of unconstitutional animus.

This Court has long recognized equal protection and due process protections for family relationships such as those burdened by the Executive Order. The Order's broad sweep affects married couples, fiancés, parents, children, siblings, grandparents, aunts, uncles, and cousins of American citizens and residents, implicating rights recognized by this Court in cases such as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), and *Troxel v. Granville*, 530 U.S. 57 (2000). Most recently, in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the Court explained how the dignity inherent in choosing a life partner and in making autonomous decisions about family life; the opportunity for mutual care and companionship; the nurturing of children; and the exercise of responsible citizenship all support the recognition of a constitutional interest in family relationships, including but not limited to marriage.

These constitutional family interests are particularly profound for transnational families, in which relatives who are especially reliant upon one another for support in times of hardship and adversity face the possibility of long-term or even permanent separation. The "personal choice" regarding marriage and family formation "inherent in the concept of individual autonomy" does not stop at a national border. *See Obergefell*, 135 S. Ct. at 2589. The "two-person union," *id.*, is especially integral to families separated by distance,

or riven by war, famine, or persecution. The reunification of parents and children "safeguards children and families" and facilitates Americans' exercise of their "rights of childrearing, procreation, and education." *See id.* at 2590. If marriage is generally "a keystone of our social order," *id.* at 2601, it is particularly so in relationships involving immigrants, who are the "building block[s] of our national community" and often rely on family to facilitate their integration into the polity. *Id.*

This Court has been especially protective of individuals where, as here, government action simultaneously infringes fundamental constitutional rights and discriminates based on unlawful animus. By targeting persons from six predominantly Muslim countries for disparate treatment, the executive uses race, religion, and nationality to treat the family members of some American citizens and residents differently from others in violation of equal protection. By denigrating the religious identities, traditions, and practices of American Muslim families, the Executive Order violates the Establishment and Free Exercise Clauses. And the Order violates the procedural due process rights of American citizens and residents whose family members seek admission to the United States. Unlike cases in which individuals have been found to pose a specific threat, the government has no evidentiary basis for believing that admitting the individuals targeted by the Order would endanger national security or any other bona fide or legitimate government interest.

The discriminatory racial, religious, and nationality-based animus underpinning the Executive Order by itself contravenes fundamental constitutional principles. The Order's targeting of noncitizens

on these invidious grounds, by "slicing deeply into the family itself," *Moore*, 431 U.S. at 498, also violates the constitutionally protected dignity and integrity of family relationships. Notwithstanding the deference afforded executive authority over immigration, the Order offends the Constitution and cannot survive meaningful judicial review.

ARGUMENT

Amici write to apply their expertise in immigration law and family law to the scope of federal power over immigration and the role of the judicial branch in cases involving immigration restriction and constitutional family interests. Many other noncitizens who do not have family in the United States have also been affected adversely by the Order. They, too, have constitutional claims. This brief, however, focuses on the specific impact of the Order on American citizens and lawful permanent residents (hereinafter, "American citizens and residents") with family abroad.

I. AMERICAN CITIZENS AND LAWFUL PERMANENT RESIDENTS HAVE A CONSTITUTIONAL INTEREST IN THEIR FAMILY RELATIONSHIPS

The March 2017 Executive Order disrupted the lives of many individuals, both in the United States and abroad. Many of those most directly affected are American citizens and lawful permanent residents who possess constitutionally protected interests in residing and associating with their family members. The Order's broad sweep prevents them from reuniting with their noncitizen spouses, fiancés, parents, children, grandparents, siblings, and aunts and uncles. The Order has affected adversely many American citizens and residents who wanted their loved ones to

travel to the United States on temporary visas to join them for a variety of reasons: to mark important life events, such as a wedding, graduation, funeral, or the birth of a child; to provide care to a new baby or an ill relative; or to receive medical care unavailable in their home country. The strength of the constitutional interests of these diverse individuals varies, but they all share a dignity interest in having their family relationships recognized and respected by the government.

A. Courts review cases implicating constitutional rights and interests when Congress and the executive regulate immigration

Both Congress and the executive routinely regulate the flow of immigrants into the United States. Although there is no textual grant of authority to either the legislature or the executive in the U.S. Constitution, this Court has repeatedly held that such authority is a necessary one for a sovereign nation to enjoy. *See, e.g., Fong Yue Ting v. United States,* 149 U.S. 698, 712 (1893) (finding that "[t]he Constitution has granted to Congress the power to regulate commerce with foreign nations, including . . . the bringing of persons into the ports of the United States"). This power, however, sits side-by-side with the judicial branch's obligation to enforce the limitations on government power set forth in the U.S. Constitution. In particular, citizens and lawful permanent residents have a greater constitutional interest than noncitizens seeking first-time admission to the United States because of their ties to the nation. *See Landon v. Plasencia*, 459 U.S. 21, 33 (1982) (noting that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes

accordingly"). Moreover, the Court has not foreclosed the possibility of constitutional review for discriminatory actions against noncitizens who are unlawfully present in the country. *See, e.g.*, *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (upholding decision to deport unlawfully present noncitizen against constitutional challenge, but leaving open "the possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations [regarding the potential undermining of executive discretion] can be overcome"); *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down Texas law discriminating against undocumented children).

Separation-of-powers principles thus require courts to scrutinize immigration laws and actions that implicate the constitutional rights of American citizens and lawful permanent residents, but in a manner that affords deference to Congress and the executive branches in light of their important interest in foreign affairs and national security. *Kleindienst v. Mandel*, 408 U.S. 753 (1972), provides an example of the Court's recognition of the constitutional interests of American citizens in the context of an immigration restriction. There, the Court considered whether the government's decision to deny admission to the Belgian Marxist scholar Ernst Mandel was unlawful because it violated the First Amendment rights of persons in the United States to meet and speak with him. The Court determined that Mandel's abuses of the limitations on his visas in previous visits to the United States constituted a "facially legitimate and bona fide reason" sufficient to deny Mandel the temporary visa he sought. *Id.* at 769–70. This Court recognized, however, that the American scholars who had invited Mandel to speak had a constitutionally

protected interest in meeting and speaking with Mandel. Even though Mandel himself, "as an unadmitted and nonresident alien," did not have a constitutional right of entry, the other plaintiffs—all individuals in the United States—had constitutional claims that the courts must hear and adjudicate. *Id.* at 762.

In other cases, the recognition of a resident noncitizen's constitutional interest has resulted in the Court's rejection of the executive branch's position. For example, in *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Court invalidated the indefinite detention of noncitizens beyond six months absent a significant likelihood of removal in the reasonably foreseeable future. *See id.* at 701. The Court's analysis included two steps. First, it made clear that well-established constitutional protections apply to lawful permanent noncitizen residents, even those who lose that lawful permanent resident status because of criminal convictions. *Id.* at 693. Second, it reasoned that the indefinite detention of former noncitizen residents raised a constitutional question that was serious enough, applying the doctrine of constitutional avoidance, to limit detention under 8 U.S.C. § 1231(a)(6). 533 U.S. at 694–95. In both steps of *Zadvydas*, the Court employed constitutional reasoning. Even if it were possible to dismiss the second step's application of a "serious constitutional doubt" standard as subconstitutional, the Court's first step left no doubt that noncitizen residents may invoke the protections of the U.S. Constitution where, as here, a government immigration law decision impairs their interests. In each of these cases, the Court has been careful to be deferential to Congress's authority while simultaneously recognizing the constitutional interests of citizens

and noncitizens alike, and—where those interests are or would be violated—providing a remedy.

Many of the cases in which an American citizen or lawful permanent resident has an interest in the visa status of a noncitizen are cases in which the American party has an interest in sharing a household or visiting with the noncitizen. In these cases, this Court has recognized the American party's interest when adjudicating whether the government's denial of admission or decision to remove the noncitizen is constitutionally permissible. For example, in *Fiallo v. Bell*, 430 U.S. 787 (1977), the Court reviewed a constitutional challenge to Congress's definition of "child" in the Immigration and Nationality Act, 8 U.S.C. §§1101(b)(1)(D), 1101(b)(2). In reviewing, though ultimately upholding, these portions of the INA, the Court recognized its "limited judicial responsibility under the Constitution even with respect to the power of Congress to regulate the admission and exclusion of aliens." 430 U.S. at 793 n.5. Similarly, in *Landon v. Plasencia*, the Court recognized that a lawful permanent resident has "without question" a "weighty interest" sufficient to invoke procedural due process protections: "She stands to lose the right 'to stay and live and work in this land of freedom,'" and "may lose the right to rejoin her immediate family, a right that ranks high among the interests of the individual." 459 U.S. at 34 (remanding deportation case for application of *Mathews v. Eldridge* procedural due process test).

More recently, in *Kerry v. Din*, 135 S. Ct. 2128 (2015), this Court reaffirmed its authority to decide cases implicating constitutional family rights even where Congress has exercised its authority over immigration. In *Din*, a U.S. citizen to whose spouse the State Department had denied a permanent residency

visa petitioned the Court for additional process. *See id.* at 2142 (Breyer, J., dissenting) ("Din, an American citizen, wants to know why the State Department denied a visa to her husband, a noncitizen"). The Court split in its analysis, but six of the nine justices acknowledged that a court may continue to recognize a citizen's constitutional family rights even where the political branches have an interest in immigration control. *See id. at* 2140–41 (Kennedy, J., concurring) (holding that the Court "need not decide" the issue of "whether Din has a protected liberty interest" because "the notice she received regarding her husband's visa denial satisfied due process"); *id.* at 2142 (Breyer, J., dissenting) (stating that Din "possesses the kind of 'liberty' interest to which the Due Process Clause grants procedural protection"). Although in *Din* the concurring (and controlling) opinion determined that the government's concerns that a specific individual posed a terrorist threat overrode the U.S. citizen's interest in additional process, it honored the citizen's constitutional family interest in residing with her husband by applying the same "facially legitimate and bona fide" test that it applied to an action that implicated the First Amendment rights of U.S. citizens in *Mandel*. *Id.* at 2139–41 (Kennedy, J., concurring).

In *Din*, like *Mandel* before it, the Court found that the Executive satisfied the requirement of a "facially legitimate and bona fide reason." *Id.* It is clear, however, that if the government acts for a reason that is *not* "facially legitimate and bona fide," the challenge must be sustained and the denial of admission must be invalidated. Indeed, judicial decisions calling for application of the "facially legitimate and bona fide reason" standard make up a substantial body of case law that scrutinizes government decisions to deny admission. *See Am. Acad. of Religion v. Napolitano*,

573 F.3d 115, 125–26 (2d Cir. 2009); *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008); *Adams v. Baker*, 909 F.2d 643, 647–50 (1st Cir. 1990).

In summary, courts routinely scrutinize immigration laws and actions, and even though the standard applied is generally more deferential than in other contexts, courts have the authority to invalidate laws and actions that violate citizens' and residents' constitutional rights.

B. The Court's current approach to balancing individual constitutional interests with the political branches' authority over immigration has evolved over time

Earlier in our nation's history, this Court afforded much more deference to the political branches in cases involving immigration than it does today. Much of this change is the result of the evolution of the Court's jurisprudence of equal protection and fundamental rights, including constitutional family rights.

The earliest cases establishing congressional authority over immigration upheld the exclusion and deportation of Chinese immigrants by embracing racially discriminatory rationales. *See Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 606 (1889) (affirming government's power to determine that "foreigners of a different race" are "dangerous"); *Fong Yue Ting v. United States*, 149 U.S. 698, 732 (1893) (affirming government power to require "one credible white witness" for Chinese residents to obtain the certificate necessary to avoid deportation). The Court decided these cases during the same era in which it concluded that Jim Crow laws and racial segregation did not present constitutional

problems. *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (upholding "separate but equal" railway cars for blacks and whites and opining that "the underlying fallacy of the plaintiff's argument" is "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.").

Today's Court no longer understands the Constitution to support racial discrimination. This Court's equal protection jurisprudence has evolved, so that "separate but equal" treatment of individuals based on race or other constitutionally protected suspect characteristics is no longer constitutionally permissible. *See, e.g.*, *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294 (1955) (declaring racial discrimination in public education unconstitutional); *United States v. Virginia*, 518 U.S. 515 (1996) (categorical exclusion of women from a particular educational opportunity violates equal protection). Similarly, the Court's Free Exercise Clause and Establishment Clause jurisprudence have also developed, to forbid statutes that "stem from animosity to religion or distrust of its practices," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993), or "signal disfavor toward nonparticipants or suggest that their stature in the community was in any way diminished," *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1826 (2014).

Even in cases involving a deferential standard of review, this Court has repeatedly held that "animus" or a "bare . . . desire to harm" a particular group is sufficient to invalidate a statute. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–535

(1973)) (holding that the "Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group'"); *Romer v. Evans*, 517 U.S. 620, 634–35 (1996) (same). As a result, although the Court still gives wider latitude to Congress in matters involving immigration than in other areas, the racially discriminatory statutes at issue in *Chae Chan Ping* and *Fong Yue Ting* would now not survive even the most deferential review, nor would a statute targeting religious minorities or using immigration law to establish religion. *See American-Arab Anti-Discrimination Comm.*, 525 U.S. at 491 (noting that "discrimination" that is "outrageous" could result in the invalidation of executive action in an immigration case).

A similar evolution has occurred in the recognition of the constitutional status of family relationships. During the Cold War, this Court heard cases brought by the spouses of U.S. citizens who had been excluded from the country and denied the due process they sought. In *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950), the German-born wife of an American citizen was excluded from the United States without a hearing on the ground that her admission would be "prejudicial to the interests of the United States." *Id.* at 539. In *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), a permanent resident of the United States left his wife and children in upstate New York to visit his dying mother abroad and was denied entry upon his return on suspicion of communist activity because of his trip behind the "Iron Curtain." In both cases, this Court invoked immigration authority to avoid deciding the cases, stating that it could not review decisions of the

political branches to exclude a particular alien. 338 U.S. at 543; 345 U.S. at 212.

Just as it decided *Chae Chan Ping* and *Fong Yue Ting* prior to the development of modern equal protection doctrine, the Court decided *Knauff* and *Mezei* during the very brief period in which the Court no longer recognized family rights as established by the common law in the immigration context but had not yet developed its modern constitutional approach to family rights. *See* Kerry Abrams, *Family Reunification and the Security State*, 32 Const. Comm. 247, 250-58 (2017) (showing how courts used common law family rights to interpret restrictive immigration statutes to allow for family reunification prior to *Knauff* and *Mezei* and applied constitutional family rights afterwards). Thus, in *Knauff* and *Mezei*, the Court did not consider the constitutional interests of family members to share a common residence, to marry unconstrained by racial discrimination, or the many other facets of constitutional family rights recognized by the Court today. *See infra* Part II. As this Court recently declared in *Obergefell v. Hodges*, "the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." 135 S. Ct. 2584, 2603 (2015). It was not until, first in *Fiallo v. Bell* and again in *Kerry v. Din*, discussed above, that the Court acknowledged its duty to adjudicate immigration cases that touch on constitutional family rights.

C. Executive action, like congressional lawmaking, in the immigration area is subject to judicial review

Although the primary authority over immigration recognized by this Court lies with Congress, the Court has consistently recognized that the executive performs an important function in enforcing the law and exercising authorities delegated to it by Congress. Indeed, many of the cases in which the Court has scrutinized government action have involved delegated authority to the executive. *See, e.g.*, *Din*, 135 S. Ct. 2128 (evaluating State Department's decision to deny noncitizen spouse admission to United States); *Mandel*, 408 U.S. 753 (evaluating Attorney General's decision to deny visa to noncitizen).

The President in this case cites as his authority to issue the Executive Order one such delegation—section 212(f) of the Immigration and Nationality Act, which delegates authority to the President to "suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants." 8 U.S.C. § 1182(f). Congress enacted this provision in 1952. Just as congressional lawmaking must be read in light of the equal protection and fundamental rights jurisprudence this Court has developed since 1952, so too must the executive's exercise of his delegated authority.

Indeed, Congress, like the Court, has evolved in its understanding of the importance of family reunification since 1952. To facilitate family reunification, Congress has enacted a complex statutory scheme designed to reunite U.S. citizens and residents with their family members abroad, in order to foster the dignity, autonomy, protection of children, and responsible citizenship this Court recognized as the purposes underpinning constitutional family rights in *Obergefell*.

135 S. Ct. at 2599–2603. The current Immigration and Nationality Act facilitates family reunification in many ways, including offering permanent residency to the immediate relatives of U.S. citizens, as well as to the immediate relatives of U.S. permanent residents and to the adult and married children and siblings of U.S. citizens. 8 U.S.C. § 1153. These statutory provisions provide long-term family reunification for both nuclear and extended families. The statutory supports for family reunification, however, extend far beyond issuing permanent residency visas to family members. In 2015, the most recent year for which data is available, over half of the "employment-based" and "diversity" permanent residency visas went to the spouses and children of primary beneficiaries, as did over a third of refugee and asylee visas. Office of Immigration Statistics, *Persons Obtaining Legal Permanent Resident Status, Lawful Permanent Residents (LPRS)*, Table 7d, https://www.dhs.gov/immigration-statistics/lawful-permanent-residents.

All told, the family members of U.S. citizens or permanent residents received around 80% of the permanent resident visas allocated in 2015. *Id.* (at least 839,203 of the 1,051,031 are either family-preference, immediate-relative, or derivative-beneficiary visas). Similarly, many people holding temporary visas do so as the spouses or children of temporary visitors on many categories of work visas. 8 U.S.C. §1101(a)(15). Further preferences for family members include a shorter waiting period for eligibility to become a naturalized citizen for the spouses of U.S. citizens, 8 U.S.C. § 1430, derivative citizenship by birth and automatic naturalization for the children of American citizens, 8 U.S.C. §§ 1401, 1431, 1433, and cancellation of removal criteria that allow some otherwise removable immediate family members of American

citizens and lawful permanent residents to remain in the United States. 8 U.S.C. § 1229b.

The existence of congressionally approved family reunification provisions does not negate the executive's delegated INA § 212(f) authority to suspend immigration. The congressional scheme, however, can help highlight the scope and consequences of, as well as motivations behind, a President's use of the § 212(f) power. Where the executive's actions contravene not only accepted constitutional principles but also the structure and function of the entire admissions portion of the Immigration and Nationality Act, courts must scrutinize these actions for evidence of animus against the classes of noncitizens targeted by the executive. *See Romer v. Evans*, 517 U. S. 620, 633 (1996) (quoting *Louisville Gas & Elec. Co. v. Coleman,* 277 U.S. 32, 37–38 (1928)) (holding that "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision").

This scrutiny is especially critical where the constitutional family interests of American citizens and lawful permanent residents are at stake, and where the government's motivation is tainted by invidious discrimination based on race, religion, or nationality. The next Part will explore the contours of these constitutional family interests and their intersection with equal protection.

II. THIS COURT HAS AFFORDED BROAD PROTECTIONS TO THE FAMILY UNDER THE CONSTITUTION, AND THESE PROTECTIONS TRIGGER SPECIAL SCRUTINY WHEN THEIR INFRINGEMENT IS COMBINED WITH INVIDIOUS DISCRIMINATION

Under the framework outlined above, Courts must scrutinize allegations of constitutional deprivations under, at a minimum, rational basis review. Where, as here, the executive couples its abridgement of constitutional family rights with invidious racial and religious discrimination, an even higher standard of review is appropriate, even in the immigration context.

A. This Court has recognized a broad array of family rights protected under the Due Process and Equal Protection Clauses of the Fourteenth Amendment

This Court has long recognized that the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution protect family relationships. U.S. Const. Amend. XIV; *see also Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing parental interest in shaping child's education under the Due Process Clause); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing right to marry under the Due Process Clause and right to racial equality in marriage laws under the Equal Protection Clause). The family interests recognized previously by the Court include the right of adults to marry, *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); the right to choose whether to bear or beget a child, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Skinner v. Oklahoma ex. rel. Williamson*, 316 U.S. 535 (1942); and the right to

procedural due process in the termination of a legal parent-child tie, *Lehr v. Robertson*, 463 U.S. 248 (1983); *Stanley v. Illinois*, 405 U.S. 645 (1972).

The scope of family interests recognized by this Court extends far beyond rights to fair and equal treatment in the entry into and exit from family relationships. Those family interests also encompass the rights enjoyed by family members by virtue of their legal relationships. These include the right of family members to live in a shared household, *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); the right of parents to make decisions about their children's education, *Meyer*, 262 U.S. at 399; *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); and the right of adult couples to privacy in intimate matters, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003).

In addition to recognizing a diverse array of interests under the broad umbrella of constitutional family rights, this Court has also defined family capaciously, to include not only marital relationships and biological parent-child relationships, but also relatives beyond the nuclear family. In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), for example, the Court embraced an expansive definition of constitutionally protected family relationships worthy of due process protection. As Justice Powell observed, "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and deserving of constitutional recognition." *Id.* at 504 (plurality opinion); *see also Troxel v. Granville*, 530 U.S. 57, 64 (2000) (reaffirming the importance of extended family ties,

particularly for children whose parents are unable to care for them); *id.* at 98 (Kennedy, J., dissenting) (observing that "[f]or many boys and girls a traditional family with two or even one permanent and caring parent is simply not the reality of their childhood"); *Prince v. Massachusetts*, 321 U.S. 159 (1944) (analyzing the constitutional parental rights of an aunt who was guardian for her nine-year-old niece).

Most recently, this Court recognized the importance of constitutional family rights in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In affirming the right of same-sex couples to marry, the Court explained the principles underlying its previous constitutional family jurisprudence. *Id.* at 2598–2601. First, "personal choice regarding marriage is inherent in the concept of individual autonomy." *Id.* at 2599. Marriage "fulfils yearnings for security, safe haven, and connection that express our common humanity." *Id.* (quoting *Goodridge v. Massachusetts*, 798 N.E. 2d 941, 955 (Mass. 2003)). Second, the right to marry is "fundamental because it supports a two-person union unlike any other in its importance to the committed individuals . . . Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other." *Id.* at 2599–2600. Third, marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." *Id.* at 2600. Fourth, marriage is a "keystone of our social order." *Id.* at 2601.

The principles undergirding judicial recognition of constitutional family rights as articulated by the Court in *Obergefell* apply with equal, if not greater force, to transnational families, both nuclear and

extended. Indeed, the increasingly interconnected nature of the world means that binational and transnational families abound within the United States. The "personal choice" regarding marriage and family formation "inherent in the concept of individual autonomy" does not stop at a national border, *see id.* at 2599, a principle that our immigration laws recognize by facilitating family reunification. The importance of the "two-person union" is especially profound in instances where a family faces potentially life-long separation; it is for these families that the "universal fear" of living without contact with one's loved ones is particularly acute. *See id.* at 2600. The reunification of parents and children "safeguards children and families" and facilitates American citizens' and residents' exercise of their "rights of childrearing, procreation, and education." *See id.* Finally, if marriage is generally "a keystone of our social order," *id.* at 2601, it is particularly so in relationships involving immigrants, who are the "building blocks of our community" and often rely on family to facilitate their integration into the polity. *Id.*; *see also Moore*, 431 U.S. at 503-04 ("[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural").

The notion that American citizens and lawful permanent residents could simply relocate to their relatives' countries of legal residence would not cure a restrictive statute or order's constitutional infirmity. Many American citizens and lawful permanent residents simply cannot relocate to another country, either because that country's legal system does not possess the constitutional commitments to family interests and nondiscrimination that ours does, or because the American might suffer persecution there. Even if, however, an American could safely relocate,

forcing a citizen to do so would result in the same constitutional deprivation suffered by the Lovings in *Loving v. Virginia*. There, the couple had the option of moving from Virginia to Washington, D.C.—indeed, they traveled to the District of Columbia to solemnize their marriage because they were prohibited from doing so in Virginia. The statute in question, however, prohibited them from returning to Virginia to live as a married couple, and this Court found that limitation constitutionally impermissible. *See also Obergefell*, 135 S. Ct. at 2595 (noting that nonrecognition of a marriage legally entered into in another state creates a "substantial burden" on a couple's right to travel).

Despite the broad protection this Court has recognized for family relationships, it has never viewed constitutional family rights as automatically overriding the government's interests in regulating members of families. Rather, the Court gives family members' claims the solemn consideration they deserve while also fairly weighing the government's interest. For example, in cases where individuals alleged that the government's action discriminated against them because of their group membership or violated their fundamental rights under the Due Process or Equal Protection Clauses, this Court applied the appropriate level of scrutiny to the government's actions. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (holding that "[w]hen a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests"); *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) (quoting *Romer v. Evans*, 517 U. S. 620, 633 (1996)) (holding that "discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to

the constitutional provision"). In cases involving procedural due process, the Court has read the Due Process Clause to require, among other things, a "clear and convincing" evidentiary standard for the termination of parental rights, *Santosky v. Kramer*, 455 U.S. 745, 748 (1982); the waiver of court fees and costs for indigent litigants in divorce cases, *Boddie v. Connecticut*, 401 U.S. 371 (1971); and the waiver of judicial transcript fees for indigent appellants in parental termination cases, *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996) *id.* at 129 (Kennedy, J., concurring) (state required to waive fee because case involved "the rights and privileges inherent in family and personal relations").

In immigration cases, courts consider the competing priorities that Congress must take into account when regulating immigration. Immigrant families, for example, often endure long waiting periods for visas, because the Immigration and Nationality Act privileges some family relationships over others, and privileges the family relationships of citizens over those of lawful permanent residents. See INA §§ 201, 203, 8 U.S.C. §§ 1151, 1153. This Court has acknowledged that although "it could be argued that the line should have been drawn at a different point[,] . . . these are policy questions entrusted exclusively to the political branches of our Government." *Fiallo*, 430 U.S. at 798. As discussed above, however, the relatively deferential review provided in immigration cases is not a rubber stamp. It does not insulate the government from judicial review where the "policy questions" involved infringe the due process rights of American citizens and lawful permanent residents, or when the government regulates immigration in an invidiously discriminatory manner.

B. This Court takes particular care in safeguarding the constitutional interests of individuals whose fundamental rights are infringed through discriminatory action

Where government action impinges upon two independent constitutional interests, courts often read these interests as reinforcing one another. In *Loving v. Virginia,* for example, the Court struck down the discriminatory statute at issue under both the Equal Protection and Due Process clauses, explaining that "[t]o deny this fundamental freedom [the freedom to marry] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." 388 U.S. at 12. Most recently, in *Obergefell*, the Court addressed the interaction of the Due Process and Equal Protection clauses directly: "[r]ights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right." 135 S. Ct. at 2603; *see also M.L.B.*, 519 U.S. at 120 (noting that the Court's "decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns"). In cases in which two constitutional interests, such as equality and a fundamental right, are at stake, those interests work together synergistically.

Sometimes, this mutual reinforcement is even enough to allow for constitutional scrutiny of a claim that would otherwise receive none, or to increase the constitutional scrutiny of a claim that would otherwise receive a more deferential standard of review. For example, in *Plyler v. Doe*, 457 U.S. 202 (1982), using an intermediate scrutiny analysis, this Court struck down a law withholding funding from school districts that employed those funds to educate undocumented children. It did so even though the undocumented noncitizens were not a "protected class" and education was not a "fundamental right." *Id.* at 223. The discrimination, coupled with the importance of both the children's need for education and society's interest in fostering the education of its residents, were enough, taken together, for the application of intermediate scrutiny. Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 Boston U. L. Rev. 1309, 1338–39 (2017).

Just as courts can apply heightened scrutiny when government action involves invidious discrimination coupled with infringement of a fundamental right, they may also do so when a government action infringes individual rights while also violating structural constitutional principles. For example, in *I.N.S. v. Chadha*, 462 U.S. 919 (1983), this Court declared unconstitutional a section of the Immigration and Nationality Act that allowed a Congressional veto of the executive's decision, made under its delegated power, to allow a deportable noncitizen to remain in the United States. *See id.* at 923, 959. Although *Chadha* concerned the individual rights of a particular lawful permanent resident under the immigration statute, the Court decided the case based on structural constitutional principles. *Id.* at 950–52. It did so *despite* the "political" nature of the decision to deport a noncitizen, noting that "despotism comes on

mankind in different shapes," and that the framers of the Constitution designed it to prevent both Congress and the executive from succumbing to despotism. *Id.* at 949 (quoting 1 M. Farrand, The Records of the Federal Convention of 1787, at 254 (1911)).

The requirement of a bicameral legislature at issue in *Chadha* is not the only structural constitutional provision that safeguards the individual rights of Americans. Many other constitutional provisions are also structural in nature, not least of which is the Establishment Clause. U.S. Const. amend. I. This Court has noted that the intent of the Establishment Clause "was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation." *McGowan v. Maryland*, 366 U.S. 420, 465–66 (1961).

In summary, courts apply heightened scrutiny to government action that infringes upon fundamental family rights under the Constitution. Where these fundamental rights are infringed upon in a way that also violates equal protection, or where they are violated in a way that also contravenes the Constitution's structural provisions, courts enforce constitutional protections even in contexts, such as immigration, where review is generally deferential.

III. THE COURT SHOULD INVALIDATE THE EXECUTIVE ORDER BECAUSE IT IMPINGES UPON, INTER ALIA, THE CONSTITUTIONAL FAMILY RIGHTS OF AMERICAN CITIZENS AND LAWFUL PERMANENT RESIDENTS

The Executive Order at issue in this case impinges upon the constitutional family rights of American citizens and lawful permanent residents in two distinct but related ways. First, by targeting the residents of predominantly Muslim countries for disparate treatment, the Order deploys invidious racial and religious discrimination to deny American citizens and lawful permanent residents their fundamental constitutional family rights.

Granted, this discrimination alone might be enough, even without the constitutional family interests discussed here, to invalidate the Order. The targeting of particular noncitizens for unfavorable treatment based solely on their religion, race, or nationality violates principles of Equal Protection, as well as the Free Exercise and Establishment Clauses. This rank stereotyping of an entire people as undesirable is exactly the type of "rare case" of "outrageous" discrimination anticipated by this Court in *American-Arab Anti-Discrimination Committee*, 525 U.S. at 491; *see also Plyler*, 457 U.S. 202 (striking down law discriminating against undocumented children).

Here, however, the government has gone even further. The Order has targeted noncitizens based on race, religion, and nationality by "slicing deeply into the family itself," *Moore*, 431 U.S. at 498, in violation of the family dignity rights affirmed by this Court's long line of constitutional family cases, from *Loving* to *Obergefell*. It uses impermissibly discriminatory

means to interfere in the ability of American citizens and lawful permanent residents to meaningfully nurture and maintain their close family relationships. Just as it did in *Loving*, the Court should recognize that the "denial of fundamental freedom on so unsupportable a basis as . . . racial classifications" deprives citizens and lawful permanent residents of their liberty without due process of law.

Second, the Executive Order violates the procedural due process rights of American citizens and residents whose family members seek admission to the United States by barring consideration of evidence of admissibility. This Court has held that the constitutional family interests of American citizens and residents are sufficiently grave to merit procedural due process when curtailed. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that an individual's private interest must be balanced with the risk of erroneous deprivation of the interest and the government's interest in not providing process); *Landon*, 459 U.S. at 34 (finding the "right" of lawful permanent resident "to rejoin her immediate family" sufficient to require procedural due process analysis under *Mathews*); *Din*, 135 S. Ct. at 2141 (Kennedy, J., concurring) (holding that where government made specific finding of noncitizen's inadmissibility under the INA's terrorism bars, this finding satisfied procedural due process). Just like the plaintiff in *Din*, the American family members of those noncitizens affected by the Order have a constitutional family interest in reunification with their relatives. *See also Landon*, 459 U.S. at 23 (recognizing the due process interests of a lawful permanent resident who "established a home in Los Angeles with her husband, a United States citizen, and their minor children"). This interest holds whether the relative is a spouse, *see Obergefell*, 135 S.

Ct. 2584, a child, *see Troxel*, 530 U.S. 57, or an extended family member, *see Moore*, 431 U.S. 494.

Because this case arises in an immigration context, the standard of review is more deferential than in other contexts. *See Fiallo*, 430 U.S. 787. But even under that deferential standard, the Order fails. Under *Din* and *Mandel*, the Court must determine whether the executive had a "bona fide" and "facially legitimate" reason to exclude the specific individuals who were targeted by the Order. Unlike the Executive Order at issue in this case, the *Din* Court was evaluating an agency decision about a *specific* individual's *specific* activities that allegedly made him inadmissible under the terrorism bars. 135 S. Ct. at 2141 (Kennedy, J., concurring). In contrast, in this case, the government has made no specific findings as to any of the plaintiffs. Instead, the Executive Order excludes *all* visa applicants from six predominantly Muslim countries, regardless of whether there is any evidence of inadmissibility under the statute or harm to the nation's security. By precluding any consideration of this evidence, the Executive Order violates procedural due process.

The waiver process set forth in the Order does not cure the problem. Order § 3(c). The government appears to suggest that the waiver process relieves it of the burden to demonstrate a "bona fide and facially legitimate reason" for the Order's restrictions on visas. However, the waiver process places a new burden of demonstrating "undue hardship" on the shoulders of the people seeking visas. These individuals are still being targeted based on their religion, race, and nationality; other noncitizen family members of American citizens and residents seeking admission who do not reside in one of the six predominantly

Muslim countries do not have to demonstrate "undue hardship." As discussed above, discrimination based on animus toward a particular race, religion, or nationality is not a "bona fide" or "facially legitimate" reason to revoke a visa, or to impose additional burdens on those seeking visas. Under the "bona fide and facially legitimate" test mandated by *Mandel* and *Din*, the Executive Order fails.

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted,

MARK A. ARONCHICK
Counsel of Record
ROBERT A. WIYGUL
HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200
maronchick@hangley.com

Counsel for Amici Curiae

September 18, 2017

APPENDIX

APPENDIX

Kerry Abrams is Professor of Law at the University of Virginia School of Law, where she is the Co-Director of the Center for Children, Families, and the Law. Professor Abrams teaches courses on immigration law, citizenship law, family law, and the history of marriage law. She has written extensively on immigration and citizenship law in American history. Her articles have appeared in the *Columbia Law Review*, *California Law Review*, *Michigan Law Review*, and *Virginia Law Review*, among others.

Kristin Collins is the Senior Visiting Fellow at the Rothermere American Institute, Oxford University (2017-2018) and Peter Paul Career Development Professor at the Boston University School of Law. Professor Collins teaches courses on citizenship and immigration law, federal courts, civil procedure, family law, and legal history. She has written extensively on the legal history of the family, and in particular on the role of family law in the development of citizenship and immigration law. Her articles have appeared or are forthcoming in the *Harvard Law Review*, *Yale Law Journal*, *Duke Law Journal*, and *Law and History Review*, among others.

Ann Laquer Estin holds the Aliber Family Chair in Law at the University of Iowa. Professor Estin teaches primarily in the area of family law, with a particular focus on international and comparative family law. She has written extensively in these areas, and is the author of the *International Family Law Desk Book* (2d ed. 2016). Professor Estin is an elected member of the American Law Institute.

Brandon L. Garrett is the Justice Thurgood Marshall Distinguished Professor of Law and White

Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law. His research and teaching interests include constitutional law, civil rights, criminal law and procedure, and habeas corpus. Garrett's work, including several books and numerous articles, has been widely cited by courts, including the U.S. Supreme Court, lower federal courts, state supreme courts, and courts in other countries.

Stephen Lee is Professor and Associate Dean for Faculty Research and Development at the University of California, Irvine School of Law. He writes and teaches in the areas of immigration law, administrative law, and food law. Professor Lee has received grants from the National Science Foundation and the Russell Sage Foundation and is an elected member of the American Law Institute. His work has appeared or is forthcoming in the *Harvard Law Review*, *Stanford Law Review*, *California Law Review*, and the *University of Chicago Law Review*, among others.

Serena Mayeri is Professor of Law and History at the University of Pennsylvania Law School, where she teaches and writes about family law, antidiscrimination law, and legal history. Her articles on constitutional family law have recently appeared in the *California Law Review*, the *Yale Law Journal*, and *Constitutional Commentary*. She is also the author of a prize-winning book, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (2011).

Hiroshi Motomura is the Susan Westerberg Prager Professor of Law at the School of Law, University of California, Los Angeles. He is the author of several pioneering law review articles on constitutional immigration law and two influential books: *Immigration Outside the Law* (2014), and *Americans*

in Waiting (2006), and a co-author of two widely used law school casebooks: *Immigration and Citizenship: Process and Policy* (8th ed. 2016), and *Forced Migration: Law and Policy* (2d ed. 2013). He was selected as a Guggenheim Fellow in 2017.

Cristina Rodríguez is the Leighton Homer Surbeck Professor of Law at Yale Law School. Professor Rodríguez teaches and writes in the areas of immigration and citizenship, constitutional law, and administrative law. She is the author of numerous articles and is the co-author of a forthcoming book on presidential power and immigration law. She is a non-resident fellow at the Migration Policy Institute in Washington, D.C. and has been a member of the Council on Foreign Relations.

Leti Volpp is the Robert D. and Leslie Kay Raven Professor of Law at UC Berkeley, where she is also the Director of the campus-wide Center for Race and Gender. She teaches immigration law and citizenship law, and has written extensively about the relationship between gender and these fields. Her work has appeared in the *Columbia Law Review*, *Harvard Civil Rights-Civil Liberties Law Review*, *UCLA Law Review*, and the *Oxford Handbook on Citizenship*, among others. She is an elected member of the American Law Institute.